Carter-Glogau Laboratories, Inc. *and* Construction, Production & Maintenance Laborers' Local Union 383, Laborers' International Union of North America, AFL–CIO. Case 28–CA–6912

October 15, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

Upon a charge filed on May 3, 1982, by Construction, Production & Maintenance Laborers' Local Union 383, Laborers' International Union of North America, AFL–CIO, herein called the Union, and duly served on Carter-Glogau Laboratories, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 28, issued a complaint on May 13, 1982, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and the complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on April 9, 1982, following a Board election in Case 28–RD–379, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about April 28, 1982, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On June 4, 1982, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On July 30, 1982, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on August 9, 1982, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and brief in opposition to the General Counsel's Motion for Summary Judgment, Respondent, in substance, attacks the validity of the certification based on its objections to the election and on its assertion that the ballots of certain economic strikers should not have been counted, contends that its refusal to bargain was based on a good-faith doubt of the Union's majority status, and further argues that the Board's failure to explicate its reasons for denying its request for review of the Regional Director's Supplemental Report, and its motions for reconsideration, amounted to a denial of due process.

A review of the record herein, including the record in Case 28–RD–379, reveals that pursuant to a Decision and Direction of Election, an election was conducted on July 1, 1981, which resulted in a 65-to-55 vote against the Union, with 28 determinative challenged ballots remaining.[2] The Employer and the Union timely filed objections to the election. In its objections, the Employer argued that the Union made certain materialmisrepresentations which affected the outcome of the election. The Union, on the other hand, asserted in its objections that the striking employees, unlike the nonstriking employees, were required to vote under unfavorable conditions and further alleged that a supervisor had been present at the polls during the election. A hearing on the challenged ballots and objections to the election was conducted between July 27 and 30, 1981, after which the Hearing Officer, on August 21, 1981, issued his report recommending that all objections and challenges to ballots be overruled, that the 28 ballots be opened and counted, and that the appropriate certification be issued. The Employer and the Union thereafter filed exceptions to the Hearing Officer's report.

On September 18, 1981, the Regional Director issued a Supplemental Decision and Order on Determinative Challenged Ballots and Objections to Conduct Affecting the Results of the Election in

[1] Official notice is taken of the record in the representation proceeding, Case 28–RD–379, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

[2] The Employer challenged the ballots of 24 voters on the grounds that they had abandoned their employment status by obtaining employment elsewhere. It subsequently withdrew the challenge to one of these ballots. The Union challenged the ballots of four voters on the ground that they had voted at an incorrect polling place.

which he adopted the Hearing Officer's recommendation that all objections be overruled and that the Union's challenges to ballots also be overruled. With respect to the Employer's challenges to ballots, the Regional Director sustained the challenges to four ballots[3] and overruled the remainder, noting that on a date to be determined by him all challenged ballots that had been overruled would be opened and counted and that a proper certification would then be issued. Thereafter, the Employer and the Union filed requests for review of the Regional Director's Supplemental Decision and Order. By telegraphic order dated March 4, 1982, the Board, while finding that a substantial issue had been raised concerning the ballots of employees Pierce, Wilshusen, Brink, and LaMarche, denied, in all other respects, the Employer's and the Union's requests for review. However, noting that the opening and counting of the ballots whose challenges had been overruled might make the ballots of the above-named individuals nondeterminative, the Board found it unnecessary to rule on their eligibility to vote until such time as a revised tally of ballots showed them to be determinative.[4] On April 1, 1982, a revised tally of ballots was issued revealing that of the 148 ballots cast, 77 were cast for, and 67 against, the Union, with the 4 challenged ballots remaining nondeterminative. The Union was thereafter certified on April 9, 1982, as the exclusive collective-bargaining representative of all employees in an appropriate unit.[5]

In relying on the objections raised in the underlying representation proceeding and by questioning the voter eligibility of certain strikers, Respondent in the instant case is seeking to relitigate matters that have previously been considered and rejected by the Board. It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances, a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[6]

Except for its contention that the Union lacks majority status and its claim that it was denied due process by the Board, all issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the underlying representation proceeding.

Further, we find without merit Respondent's contention that its refusal to bargain with the Union, occurring less than 3 weeks after it was certified by the Board, was based on a good-faith doubt of the Union's majority status based on a change in the employee complement as of that, time. The Board, with Supreme Court approval, has long held that absent unusual circumstances, a union's continued majority status is irrebuttably and conclusively presumed to exist for 1 year following certification.[7] Other than the unsupported claim in its answer that the Union did not then represent a majority of the employees in the unit,[8] Respondent has presented no unusual circumstances which justified its refusal to bargain with the Union during its certification year. Accordingly, we find that its refusal to bargain was unlawful.

We also find without merit Respondent's contention that it was denied due process by the Board's failure to explicate its reason for denying Respondent's request for review in the underlying representation proceeding. In denying the requests for review, the Board adopted as its own the rationale set forth by the Regional Director in his Supplemental Decision and Order, which it found adequate. The Board has held that no greater articulation of its rationale is required of it.[9]

In view of the foregoing, we find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding.

Accordingly, we grant the General Counsel's Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

[3] The ballots included those of employees Marvin Pierce, Rolene Wilshusen, Deborah Brink, and Frederick LaMarche.

[4] On March 4, 1982, the Employer filed with the Board a motion for reconsideration of its order denying the Employer's request for review. The Board, on March 29, 1982, denied the Employer's motion as lacking in merit. On March 19, 1982, the Employer renewed its motion for reconsideration which the Board similarly denied on April 13, 1982, since it raised nothing not previously considered.

[5] The appropriate unit consists of "All production and maintenance employees employed by the Employer at its facilities located at 5160 West Bethany Home Road, Glendale, Arizona, and 5308 West Missouri Avenue, Glendale, Arizona; but excluding quality control employees, compounding room employees, office clerical employees, professional employees, guards, and supervisors as defined in the Act."

[6] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

[7] *Lee Office Equipment*, 226 NLRB 826, 831 (1976); *Ray Brooks* v. *N.L.R.B.*, 348 U.S. 96 (1954); see also *Lexington Cartage Company, Inc.*, 259 NLRB No. 5 (1981).

[8] Respondent's claim, purportedly supported by an affidavit from its personnel manager, that the striker replacements and newly hired employees comprise a majority of the bargaining unit and that the strikers who supported the Union are a minority, is insufficient to establish that the Union lacked majority support and does not constitute "unusual circumstances" warranting its refusal to bargain during the certification year.

[9] *Middlesex Cablevision, Inc.*, 229 NLRB 1038, 1039 (1977).

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, an Ohio corporation with its principal office and place of business located in Glendale, Arizona, is engaged in the business of manufacturing and packaging injectable medications. During the past 12 months, a representative period, Respondent has purchased and caused to be shipped to its Glendale, Arizona, facility goods and materials valued in excess of $50,000 from points and places located outside the State of Arizona.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Construction, Prodution & Maintenance Laborers' Local Union 383, Laborers' International Union of North America, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All production and maintenance employees at the Employer's facilities located at 5160 West Bethany Home Road, Glendale, Arizona, and 5308 West Missouri Avenue, Glendale, Arizona; excluding quality control employees, compounding room employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

2. The certification

On July 1, 1981, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 28, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on April 9, 1982, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about April 19, 1982, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about April 28, 1982, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since April 28, 1982, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent, set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to ensure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817;

Burnett Construction Company, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Carter-Glogau Laboratories, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Construction, Production & Maintenance Laborers' Local Union 383, Laborers' International Union of North America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees employed at the Employer's facilities located at 5160 West Bethany Home Road, Glendale, Arizona, and 5308 West Missouri Avenue, Glendale, Arizona; excluding quality control employees, compounding room employees, office clerical employees, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since April 9, 1982, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about April 28, 1982, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Carter-Glogau Laboratories, Inc., Glendale, Arizona, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Construction, Production & Maintenance Laborers' Local Union 383, Laborers' International Union of North America, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All production and maintenance employees employed at the Employer's facilities located at 5160 West Bethany Home Road, Glendale, Arizona, and 5308 West Missouri Avenue, Glendale, Arizona; excluding quality control employees, compounding room employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Glendale, Arizona, facilities copies of the attached notice marked "Appendix."[10] Copies of said notice, on forms provided by the Regional Director for Region 28, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 28, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

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[10] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Construction, Production & Maintenance Laborers' Local Union 383, Laboeres' International Union of North America, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All production and maintenance employees employed at the Employer's facilities located at 5160 West Bethany Home Road, Glendale, Arizona, and 5308 West Missouri Avenue, Glendale, Arizona; excluding quality control employees, compounding room employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

CARTER-GLOGAU LABORATORIES, INC.